

St. Mary's University School of Law

Instructions

1. This examination consists of three (3) questions, and five (5) pages, including this page as the first. **Although there are three essay questions, you should answer only two (2) questions, putting each answer in a separate blue book.**
2. You will have two (2) hours in which to complete the examination.
3. St. Mary's Law School prohibits the disclosure of information that might aid a professor in identifying the author of an examination. Any attempt by a student to identify himself or herself in an examination is a violation of this policy and of the Code of Student Conduct.
4. A student should not remove a copy of the examination from the room during the exam time.
5. This is an open-book exam. You may use your textbook, class notes or any other written material, but you may not consult with any person about the exam. Use bluebooks for your answers. Please try to write neatly.
6. When you have completed the examination, turn in this copy and your bluebooks to the proctor. Be sure to write your exam number, the name of this course and the name of the professor on your bluebooks or typed pages.
7. In addition, place your exam number in the space below. If you are prevented by the oath from placing your exam number in the space below, notify the student proctor of your reason when you turn in the examination.

I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID  
IN TAKING THIS EXAMINATION, NOR HAVE I SEEN ANYONE  
ELSE DO SO.

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Exam Number

## Exam Question No. 1

You have graduated from St. Mary's and passed the bar, and you work in a firm whose speciality is commercial law. A partner in your firm is appointed to represent Joe Smith, a white male, who was convicted of robbery in the 290th Judicial District Court, and sentenced to 10 years imprisonment. You know that your boss is a zealous advocate who will do everything possible, within ethical bounds, to win Mr. Smith's case. Her first instruction to you is to prepare a memorandum which identifies all issues which arose during jury selection which might arguably be appealed by the defense. You identify the following issues:

1. Immediately after the venire was first seated in the courtroom, defense counsel requested a "jury shuffle" from the court. The trial judge demanded that counsel give reasons for the shuffle, but counsel failed to do so. The judge denied the motion to shuffle, and voir dire then commenced.
2. During his general voir dire, Mr. Smith's lawyer sought to ask the following question: "Has anyone on the panel heard anything at all about the case of the State of Texas versus Joe Smith?" The prosecutor immediately objected that this question would violate the First Amendment rights of the venire, and the trial court sustained the objection. The trial court instructed the jury not to answer this question, and ordered the defense not to ask it again of anyone else on the panel. The defense objected that this violated Mr. Smith's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.
3. During individual voir dire, venireperson Brown admitted that he would never, ever, under any circumstances, even consider probation for one found guilty of the offense of robbery. Both the prosecutor and the judge tried to rehabilitate him, but he did not budge from this position. The defense made a timely challenge for cause, stating that "Mr. Brown is unfit to serve on the jury pursuant to article 35.16(c)(2) of the Texas Code of Criminal Procedure." This challenge was overruled by the trial court. The defense later exercised a peremptory challenge against Mr. Brown to prevent him from serving on the jury. At the conclusion of voir dire, both the state and the defense exercised all peremptory challenges allotted by the statute.
4. After examining the peremptory challenges exercised by the state, you are concerned that one may be violative of the law. Specifically, the state challenged venireperson Johnson, an African-American female who was an active member of the Lutheran church. At the "*Batson*" hearing held at the

request of the defense, the prosecutor testified that he struck Ms. Johnson, not because she was female, or because she was African-American, but because she was a Lutheran which made him fear she was “soft on crime.” The defense objected that this peremptory challenge “violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Article I, § 3a of the Texas Constitution.” These objections were overruled.

After reviewing your memorandum, your boss’s preliminary inclination is to raise on appeal each of the four issues you have identified. To help her make a final decision about the contents of the appellate brief, she instructs you to do the following concerning each potential issue.

- a. Argue concisely, but persuasively, why each ruling was erroneous. Identify the statutes or constitutional provisions violated.
- b. State whether each potential erroneous ruling was properly preserved for appellate review. Explain why or why not?
- c. Conduct the appropriate harm analysis for each potential error.

## Exam Question No. 2

As prosecutor assigned to the Drug Court, you are to prosecute Mr. Big for possession of marijuana over four ounces but less than five pounds alleged to have occurred on or about February 22, 1998. When Mr. Big was arrested, he had \$3,000.00 in cash and a pager. The defense attorney has informed you that he intends to present a defense that Mr. Big did have some marijuana that day, but not the marijuana the police claim he possessed. What will you do with this information? Furthermore, Mr. Big requested that you give him notice of your intent to offer extraneous misconduct.

Additionally, Mr. Big has a lengthy prior criminal record that reads as follows:

Big, Steven  
Date of Birth: 8/13/51  
Social Security No.: 466-49-9029  
SID No.: 555444

<u>Date of Arrest</u>	<u>Charge</u>	<u>Disposition</u>	<u>Disposition Date</u>
1/1/62	Misdemeanor theft under \$50.00	2 years probation	1/3/62

3/15/65	Misdemeanor theft under \$50.00	30 days jail	3/16/65
5/4/96	Felony Possession of cocaine	5 years imprisonment, pending on appeal	6/6/92
5/13/96	Misdemeanor possession of marijuana under 2 ounces	15 days jail	8/25/96
9/15/97	Misdemeanor possession of narcotics paraphernalia	Awaiting trial	

You wish to get in as much of this misconduct as possible in the guilt/innocence phase of the trial. What should you do to insure the likelihood of its admissibility at trial? What objections are you likely to be met with? Assuming the judge follows the law, how do you think he will rule on your evidence and why? Consider and address separately each act of extraneous misconduct that you identify in this problem.

### Exam Question No. 3

Diane Davis was arrested for killing her live-in boyfriend, Fred Fink on February 14, 1998 in San Antonio, Texas. Davis and Fink had lived together for five years and had often referred to themselves as a married couple, although they were never formally married. Their relationship was a stormy one. On many occasions the police had been called to their apartment when neighbors had called to complain of loud fights and sounds indicating that someone was being hit repeatedly. Several times, Diane Davis was treated at the emergency room of the hospital but she always decided not to cooperate with investigations of her injuries. However, Diane had confided in several friends and neighbors that Fred had caused her injuries and that he was often physically abusive. Although Diane gave no statement to the police and she refused to answer all but routine questions before the grand jury on Fifth Amendment grounds, she was the only person present in the apartment on the night that Fred died from massive head injuries. Diane had called EMS at 8:30 p.m. on the night of February 14th to report that Fred was bleeding profusely, but Fred was pronounced dead on arrival at the hospital.

Diane was indicted for the offense of murder, a first degree felony under 19.02 Texas Penal Code, based upon an indictment that alleged that Diane had intentionally and knowingly caused Fred's death by "striking him with an object unknown to the grand jury." Diane pleaded not guilty and testified in her own behalf, describing years of physical abuse at the hands of Fred Fink. At trial, Diane admitted striking Fred repeatedly from behind with a heavy stone bookend as he sat back in his lounge, with the remote control for the television in one hand and a beer can

in the other. Diane stated that she feared for her life because Fred had hit her repeatedly about two hours earlier and that he was becoming intoxicated. Diane stated that she was familiar with the effect of alcohol on Fred when he was in a “bad mood” and that she was certain that he would soon attempt to injure her. Diane testified, without objection, that she had never been arrested or convicted for any criminal offense.

The defense also presented an expert witness, a psychologist and expert on “battered spouse syndrome.” Over the objection of the State, the expert testified that, in her opinion, Diane fit the pattern for this syndrome: depression, low self-esteem, a feeling of helplessness, shame, embarrassment, and an inability to deal with the abusive situation. The expert testified that, for someone in Diane’s situation, it would be reasonable to believe that it was immediately necessary to use deadly force in self-defense against her abuser. The defense also presented testimony from neighbors of Diane verifying violent attacks by Fred against Diane on several occasions over a period of several years.

At the close of the evidence, the defense requests a jury instruction on self-defense that the trial court decides to give to the jury. However, the trial court judge is uncertain whether to grant defense requests for lesser included offense instructions of manslaughter and attempted murder, both second degree felonies. The judge has asked you, a clerk for the trial judge, to write a brief memorandum discussing the defense request for the lesser included offense instructions. Be sure to address whether manslaughter and attempted murder are lesser included offenses of murder and whether the instruction(s) should be given in this case. Regardless of what you conclude with regard to the lesser offenses, the judge also would like you to explain what impact a conviction for a second degree felony, rather than the charged first degree felony, would have on the potential sentence for Diane Davis. Be sure to address eligibility for probation (or community supervision) and eligibility for early release from any prison sentence in your discussion.